In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 262.

THE GOODYEAR TIRE & RUBBER COMPANY, INC.
and
GENERAL DRY BATTERIES, INC.,
Petitioners,

vs.

RAY-O-VAC COMPANY,
Respondent.

REPLY BRIEF ON BEHALF OF PETITIONERS ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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In view of the fact that Respondent, in its Brief, has made many broad statements which are misleading and inaccurate and which are not supported by the Record, and has drawn improper conclusions from the evidence, a Reply Brief is deemed necessary.

Respondent in its Brief has made the same error as did the District Court and the Court of Appeals in that it has treated and considered Ray-O-Vac's commercial cell as the cell disclosed in the patent in suit, when such is not the fact. Respondent has repeatedly urged this Court to compare Petitioners' cell with Ray-O-Vac's commercial cell rather than to have the Court compare Petitioners' accused cell with the cell of the patent in suit.

Insofar as infringement is concerned, it is immaterial whether or not Respondent ever made a commercial cell. Ray-O-Vac's commercial cell has no relation to this case

except insofar as it may be relied upon to show commercial success. Petitioners contend that the specific cells disclosed in the Anthony patent in suit were never commercially exploited, and therefore had no commercial success. Commercial success and the matter of long-felt want are pertinent and relevant **only** in case there is **grave doubt** as to whether the claims are valid and patentable. (*Altoona Publix Theatres, Inc. et al. v. American Tri-Ergon Corp'n, et al.*, 294 U. S. 477, 79 L. Ed. 1005, 55 S. Ct. 455.)

THERE IS NO BASIS IN FACT FOR THE ASSERTIONS AT PAGES iii, 4, 9, 10 AND 19 OF RESPONDENT'S BRIEF THAT RESPONDENT'S COMMERCIAL CELL HAS "LONGER SHELF LIFE" AND "GREATER ELECTRICAL PERFORMANCE" WHICH CAN BE ATTRIBUTED TO THE ANTHONY PATENT.

Respondent has repeatedly claimed that the Ray-O-Vac commercial cell has "longer shelf life" and "increased electrical performance" because the Ray-O-Vac cell is less in diameter and uses less active materials than Respondent's Wax Top Cell. The fallacy of this deduction becomes obvious when the evidence of Record, upon which Respondent relies, is analyzed.

Only three tests, two of which were *ex parte* and self-serving, are referred to in the Record. They are—

(a) The Ray-O-Vac *ex parte* test upon which the nationally advertised assertion is based that "Ray-O-Vac Leak-Proof Cell outperforms by 46% the **average** for six leading cells" (Rec. p. 61).

(b) The five cell comparative ex parte test for shelf life between the Ray-O-Vac Wax Top Cell and the Ray-O-Vac metal sheath cell using their "Q" mix (Rec. p. 58).

(c) The Bureau of Standards six cell comparative test for "electrical performance" between the Ray-O-

Vac Wax Top Cell and the Ray-O-Vac metal sheath cell using a "Navy" mix (Rec. p. 63). This was not a shelf-life test.

None of these tests, or the results thereof, support or justify Respondent's assertions that the cells of the Anthony patent produced new and unexpected electrical results. All of the data pertains to Ray-O-Vac cells that have nothing more in common with the Anthony disclosed structures than an outer sheet metal sheath. The Anthony patent is **silent completely*** about using a smaller size zinc cup and the accused cell has a standard 1¼" diameter zinc cup size with a thick bottom such as Petitioner, General Dry Batteries, uses and had used several years before the Anthony filing date.

THERE IS NO SATISFACTORY PROOF THAT THE RAY-O-VAC METAL SHEATH CELL OUTPERFORMS ANY OTHER COMPETITOR'S FLASHLIGHT CELL.

A serious deficiency is to be found in the evidence upon which Respondent relies to support its advertising boast that

"Ray-O-Vac leak-proof cell outperforms by 46% the **average** for six leading competitive cells" (Rec. p. 61).

The only support for this nationally advertised statement is the **self-serving testimony** of the witness Ramsey that he tested six competitors' cells and that he **averaged** the

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*In the case of *Permutit Company v. Graver Corporation*, 284 U. S. 52-60, 76 L. Ed. 163, Justice Brandeis, speaking of the inference to be drawn from the absence from the specification of any reference to a detail of construction shown in the drawings, said: "The only normal inference from such silence is either that it was deemed immaterial whether the zeolite bed be locked or free, or that if a free bed is preferable, it was not claimed because it lacked novelty."

The same inferences may be drawn from the failure of Anthony to assert in his patent the advantages now claimed.

results. The record is silent as to **what makes, what age, what grade and what priced cells** Respondent selected out of the many grades and varying priced flashlight cells commercially available. There could have been one or two cells manufactured by competitors in this tested group which had a **better** "electrical performance" than the "Ray-O-Vac leak-proof cell." The actual performance of a superior competitor's cell could have been hidden by being "averaged" with inferior cells of still other competitors, simply for Respondent's advertising purposes. The catch is in the tricky word "average." Such proof might have been sufficient for the Saturday Evening Post; but it is not sufficient for a Court of Equity.

RESPONDENT HAS DEMONSTRATED THAT SHELF LIFE OF A FLASHLIGHT CELL MAY BE MATERIALLY INCREASED OR DECREASED SIMPLY BY CHANGING THE FORMULA OF THE MIX REGARDLESS OF ZINC CUP SIZE.

Respondent's assertion that an unexpected increase in shelf-life is obtained by using a zinc cup one-sixteenth (1/16) of an inch smaller in diameter than the standard one and one quarter inch (1¼) diameter zinc cup, is based upon Mr. Ramsey's testimony (Rec. p. 58) that he tested five Ray-O-Vac Wax Top Cells and five Ray-O-Vac metal sheath cells filled with their "Q" mix; and they had an electrical performance of 725 minutes and 732 minutes respectively before shelf aging. The difference is, practically speaking, nil. After shelf aging the Wax Top Cell had a six percent greater loss than the metal sheath cell in electrical performance. If such a difference is to be accorded any significance, then Respondent's Wax Top Cell can be moved up in shelf life performance simply by substituting the Wax Top Navy mix for the "Q" mix as is shown by the Bureau of Standards Report on the electrical performance of Ray-O-Vac Wax Top cells (Rec. p. 63).

Thus—

Average electrical performance of the six Wax Top Cells with Navy Mix..864 minutes

Average electrical performance of the five Wax Top Cells with "Q" mix..725 minutes

139 minutes of increase in electrical performance by changing to Navy Mix.

$\frac{139}{725} = 19.2\%$ increase in electrical performance life of Ray-O-Vac Wax Top Cells by simply changing the mix.

If this evidence is to be accepted as conclusive of anything (Petitioners maintain it should not be accepted), then it demonstrates that the Wax Top Cell, having a Navy mix, initially electrically outperforms a metal sheath cell having a "Q" mix to such an extent that any alleged advantage of increased shelf life in the metal sheath cell with a "Q" mix is negatived completely.

Also this increase in electrical performance of 139 minutes in the Wax Top Cell using a Navy mix is greater by 11 minutes than the shelf life loss of the same cell with a "Q" mix, all of which is obtained by simply changing to the Navy mix, neither group of cells having a metal sheath.

Also there is a difference of 96 minutes between the highest and lowest electrical performances of the Bureau of Standards tested Wax Top Cells, i.e. (933 — 837 = 96 minutes). There is a difference of only 44 minutes in the shelf life losses of the two types of Ray-O-Vac cells when loaded with a "Q" mix. Thus, any losses in electrical performances after aging can, when desired, be overcome by changing the mix. The quality of the mix is the controlling factor.

How can the absence or presence of a metal sheath have anything to do with this unexplained increase in the electrical performance of the Ray-O-Vac Wax Top Cell, when no sheath was present at all in the Wax Top Cells tested by the Bureau of Standards?

The real reason why Respondent decreased the size of its zinc cup in the Ray-O-Vac commercial cell is to be found in the direct testimony of Respondent's witness and vice president, Tyrel (Rec. p. 51), when, comparing the diameter of the flashlight casing with the diameter of their flashlight cell, he stated:

> "We always make as much allowance as possible leading (*leaning*) toward the side of having more space than necessary, as far as the diameter of our tubes go, so as to allow for cell expansion and **make our difficulties of sticking cells less.**" (Emphasis supplied.)

Thus, it is to be seen that Anthony never taught Respondent to use a smaller diameter zinc cup, and that Respondent was impelled in that direction for the reason stated by Mr. Tyrel. Petitioners have been accused of copying the cell structure of Fig. 1 of the Anthony patent; but strange to say, Petitioners use the standard size 1¼" diameter zinc cup.

Respondent fails to include under the heading **"THE QUESTIONS PRESENTED"** (Respondent's Brief p. 12) the question of the validity of the patent in suit. This issue, of course, is one of the main issues, if not **the main** issue, in the case, and is one of the Assignments of Errors set forth in Petitioners' Brief.

A DISTRICT COURT SHOULD NOT ENJOIN A MANUFACTURER FROM FURNISHING PATENTED DEVICES TO THE GOVERNMENT.

In the footnote to page 3 (which relates to matters not in the Record) Respondent accuses Petitioners of raising a false issue in its Petition for Writ of Certiorari. Respondent says that Petitioners are not pre-

vented from selling to the Government by reason of the Statute 35 U. S. C. A. Section 68 and cites the case of *Broome v. Hardie-Tynes Manufacturing Co.*, 92 Fed. (2d) 886. That case is not in point because Petitioners here are enjoined from manufacturing, using or selling the alleged infringing cells. The injunction appears at page 142 of the Record. Petitioners would be in contempt of Court if they manufactured the enjoined cell. We take the position that no Federal Court should enjoin a manufacturer from manufacturing devices for the Government irrespective of whether or not such devices are covered by a patent. We pointed out in our main Brief that it has been customary for the Government to require a supplier to guarantee to save the Government harmless should the devices supplied infringe any patent.

THE ANTHONY PATENT TEACHES THE USE OF A VENT FOR RELIEVING EXCESSIVE PRESSURE.

On page 8 Respondent states that Anthony avoids leakage and swelling by confining the internal pressure within the cell by crimping the steel jacket over the end closures. This statement is not true, for the Anthony patent in Figs. 1 and 11 clearly discloses a vent for relieving excessive pressure.

Under the heading "Satisfying the Long-Felt Want" (Brief p. 10), Respondent refers to the use of the Ray-O-Vac commercial cell by the Pullman Company on each of its cars, but it fails to make clear that such cells when placed on a Pullman car are not used except in case of a wreck or an emergency. The cells are placed in a closed cabinet and replaced every six months (Rec. pp. 34 *et seq.*) The Record does not show that the problem of swelling and leaking arises in this short period.

Respondent also refers to the use of Ray-O-Vac commercial cells by a utility company but fails to point out that most of these cells are used by meter readers and are re-

placed within a period of from four to seven days (Rec. p. 43).

The production figures given in Respondent's Brief at the bottom of page 11 are also misleading as the figures given include leak-proof cells as well as cells not called leak-proof. Also, if the order for twenty-one million cells sold to the Signal Corps during the fiscal year beginning July 1940 is **not** included, the total sales for 1940 are reduced by nine million, and the total sales for 1941 are reduced by twelve million. The Signal Corps used 9,000,000 of these cells in 1940 (Rec. p. 70).

Respondent states (Brief page 13) that the Army sales in 1941 accounted for 45% of its leak-proof cells. This alleged arithmetical evidence becomes too nebulous to be of any probative value whatsoever.

Near the bottom of page 13 Respondent states that the Ray-O-Vac leak-proof cell was the only cell that met the Signal Corps specifications for leak-proof cells and referred to Rec. p. 77. We deny that the Record supports this statement. Other cells meet the Army test for leakage.*

NO CRITICAL RELATIONSHIP SHOWN BETWEEN ANTHONY'S OUTER METAL SHEATH AND ZINC CUP.

On page 19, the case of *Diamond Rubber Company vs. Consolidated Rubber Tire Company*, 220 U. S. 428, is referred to as supporting the proposition that a "mechanically slight modification" over the prior art is invention

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* The Army alone uses more than 65 million flashlight cells per year, with National Carbon, Bright Star and Ray-O-Vac all sharing in the production of such cells which meet the Government specifications with respect to leakage. The Army test for these cells is contained in Specification No. 70-130 which reads as follows: "F-3A *Leakage Test*. Two batteries BA-30, connected in series, shall be discharged through 10 Ohms for 24 hours and then stored for 15 days, during which time they shall not leak or show any evidence of cell perforations."

(Taken from a letter forming a part of Petitioners' Reply Brief on Petition for Writ of Certiorari.)

when "an unexpected and important change in operation" is produced. No critical point or critical structure is disclosed here or described. The Anthony patent makes no attempt to reduce any problem to its critical point and then to supply a solution. Anthony points out no critical relationship between the outer casing and zinc cup. **There is none to point out.**

Also on page 19 of Respondent's Brief it is said the *Bell Telephone* case, 126 U. S. ....,* shows that the Reis device in the prior art would have transmitted speech if a single contact had been slightly adjusted. This appears to mean that it is Respondent's position that patentability may be predicated upon the **mere adjustability** of a single contact. No case has been cited, nor can be cited, to support this proposition. It is not the law.

Further on the same page Respondent states:

> "In every case where the need is great enough, the time long enough, and where the means to meet the need were always at hand, any change, however simple, which meets the need is proven by time to be beyond mechanical skill."

This statement must be interpreted to mean that it is Respondent's position that **any difference or change may be patentable** should history prove it to supply a long-felt want. No law is or can be cited to support such an extreme position.

Respondent refers on page 21 to the case of *Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U. S. 84, and states that the concurring opinion indicates that even the **obvious** expedient there involved might have been patentable had it satisfied an old need. **We submit that no such conclusion can be drawn from that case.**

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* Citation incomplete in Respondent's Brief. All cases reported in 126 U. S. are *Bell Telephone* cases.

In the *Cuno* case, Mr. Justice Douglas stated:

"A new application of an old device may not be patented if the 'result claimed as new is the same in character as the original result' (*Blake v. San Francisco*, 113 U. S. 679, 683, 28 L. ed. 1070, 1072, 5 S. Ct. 692) even though the new result had not before been contemplated. *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.*, 110 U. S. 490, 494, 28 L. ed. 222, 223, 4 S. Ct. 220, and cases cited."

It seems that Respondent is forced to take the **extreme** position **that anything that is new is patentable** if it supplies a long felt want.

The test of whether or not a device supplies a long felt want is only **one** of the tests to be applied to determine patentability or validity. Even this test should not be applied unless there is **real doubt** as to invention.* The same is true of the test of commercial success. We have discussed the pertinent law at length in our main Brief.

On page 19 Respondent says:

"Occasionally, as here, a device may qualify as inventive with or without a long felt want."

Thus Respondent contends that the claims in suit are valid irrespective of whether or not the cells supplied a long felt want.

Respondent quite arbitrarily divides inventions into two groups, a small group where the invention satisfies a

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* This well settled law was applied by the Fourth Circuit Court of Appeals in the case of *Triumph Explosives et al. vs. Kilgore Mfg. Co. et al.*, 128 Fed. (2d) 444. The Court said:

"It did not require invention in our opinion to introduce these improvements in the signalling pistols that were well known when the application for the first patent in suit was filed, or to devise the combination of that patent; **and this plain absence of invention is not overcome by evidence of the commercial success of the Driggs and Faber pistol even though it satisfied a long felt want.** *Altoona Publix Theatres v. Tri-Ergon Corp.*, 294 U. S. 477, 487, 55 S. Ct. 455, 79 L. Ed. 1005." (Emphasis supplied.)

long felt want, and a larger group where it does not. Such a division is wholly and entirely arbitrary and has no basis in law or in fact. The only logical division is between alleged inventions which are clearly patentable, and those concerning which there is **grave doubt.** It is to the latter group **only** that the test of "long felt want" and "commercial success" is applied.*

INFRINGEMENT.

On page 23 of Respondent's Brief under the heading "Infringement" it is stated that Petitioners had studied the patent in suit and had seen its commercial success before they undertook their deliberate infringement. The Record shows that Petitioner General Dry Batteries, Inc. had notice of the patent in suit before it began to manufacture the accused cell; but there is no proof whatever in the Record that Petitioner had studied the patent or had seen its commercial success. Petitioners deny that the cell of the patent in suit had any commercial success.

There is no proof that the cell structures shown in the patent in suit were ever marketed. Respondent contends (Brief, p. 26) that the Ray-O-Vac commercial cell is made "in accordance with the teachings of Figure 8," † and states, at the bottom of page 26, that Petitioners are squarely within the teachings of Fig. 1, yet Respondent says that

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* In the *Cuno* case Chief Justice Stone, in a concurring opinion, pointed out specific differences between the commercially exploited device and the device shown in the patent (as Petitioners have done here) and said:

"The case is therefore not one for the application of the doctrine that commercial success or the manifest satisfaction of a felt need will turn the scale in favor of invention."

† No experienced manufacturer would attempt to produce the specific cell disclosed in Fig. 8 of the Anthony patent in which the electrolyte has direct contact with the metal terminal for the carbon electrode. In such a cell, the metal terminal would soon be attacked by the electrolyte and corroded sufficiently to cause leakage particularly when the cell is laid on its side.

Petitioners copied the Ray-O-Vac commercial cell. This is indeed a *non sequitur*. If Petitioners copied the cell illustrated in Fig. 1 of the patent, how could Deibel have obtained a patent on an improved cell? Petitioners do not contend that the issuance of a patent to Deibel gave him the right to infringe an earlier patent. Deibel was granted a patent on an improved cell which shows beyond doubt that the Patent Office, at least, considered the accused cell sufficiently different to be patentable. We have pointed out in our main Brief that the accused cell operates on an opposite principle in that it relieves excessive pressure instead of attempting to confine it, as distinguished from Respondent's commercial cell.

On page 25 Respondent says that the Anthony patent does not attempt "to cover any other dry cells" having a sheet metal jacket which is insulated from both electrodes and which tightly embraces the end closures. But we call attention to the following statement appearing in Respondent's Brief at page 26:

> "Petitioners' and respondent's leak-proof cells look alike and are identical in the only novel element of the claim, i.e., the application of a novel metal jacket to a **conventional dry cell.**" (Emphasis supplied.)

The lower Court also held to the same effect and we quote the following from Judge Lindley's opinion, Rec. p. 132:

> "What did Anthony do? He added to **the conventional dry cell** a strong outer metal container to prevent swelling and leaking, insulated it from the zinc container and sealed the end closures in such a manner as to achieve practical prevention of leakage and swelling." (Emphasis supplied.)

This opinion was concurred in by the Circuit Court of Appeals; and there is nothing whatever in the opinion of the Circuit Court of Appeals which would indicate that that Court disagreed with the broad scope accorded the patent by the lower Court.

Also on page 25 Respondent contends that the claims were drafted and understood by the Patent Office to cover various types of dry cells when combined with the novel metal jacket insulated from both terminals and tightly embracing the same so as to prevent leakage of electrolyte. This is entirely conjectural as we do not know why the Examiner allowed the claims. What was said at the Patent Office interview does not appear in the Record. Moreover, there is no reason to consider **why** the Examiner allowed the claims, if he were mistaken in allowing them.

On page 28 Respondent says that the order in which the elements of the claim were recited is immaterial. The order of recitation is not important; **but it is** important as to how many elements are set forth in the claim. Petitioners contend that the claims call for an additional element in both top and bottom structures, not found in the accused cell. (See amended claim 1, Respondent's Brief p. 39.)

RESPONDENT HAS FAILED TO SHOW THAT THE OLANETA CELL WOULD NOT PERFORM AS WELL AS THE CELL DISCLOSED IN THE ANTHONY PATENT.

Under the heading "Prior Art and Practice" on page 30, Respondent criticizes the Olaneta patent and says that the purpose of the cup-shaped container is to protect the cell from outside moisture; and that it is not designed nor adapted to withstand the internal gas or mechanical pressure of a small cell which would crack the wax top seal and push it out of the free end of the container. Olaneta describes a seal of pitch or wax or a preformed plug (Rec. p. 208). There was not one word of testimony given to the effect that Olaneta would not prevent leakage and swelling. In fact Plaintiff (Respondent) offered no rebuttal testimony. We contend that the outer sheath or casing in Olaneta does **tightly embrace** the end closures, that it will **not** crack and that **it is just as leak-proof as is the cell dis-**

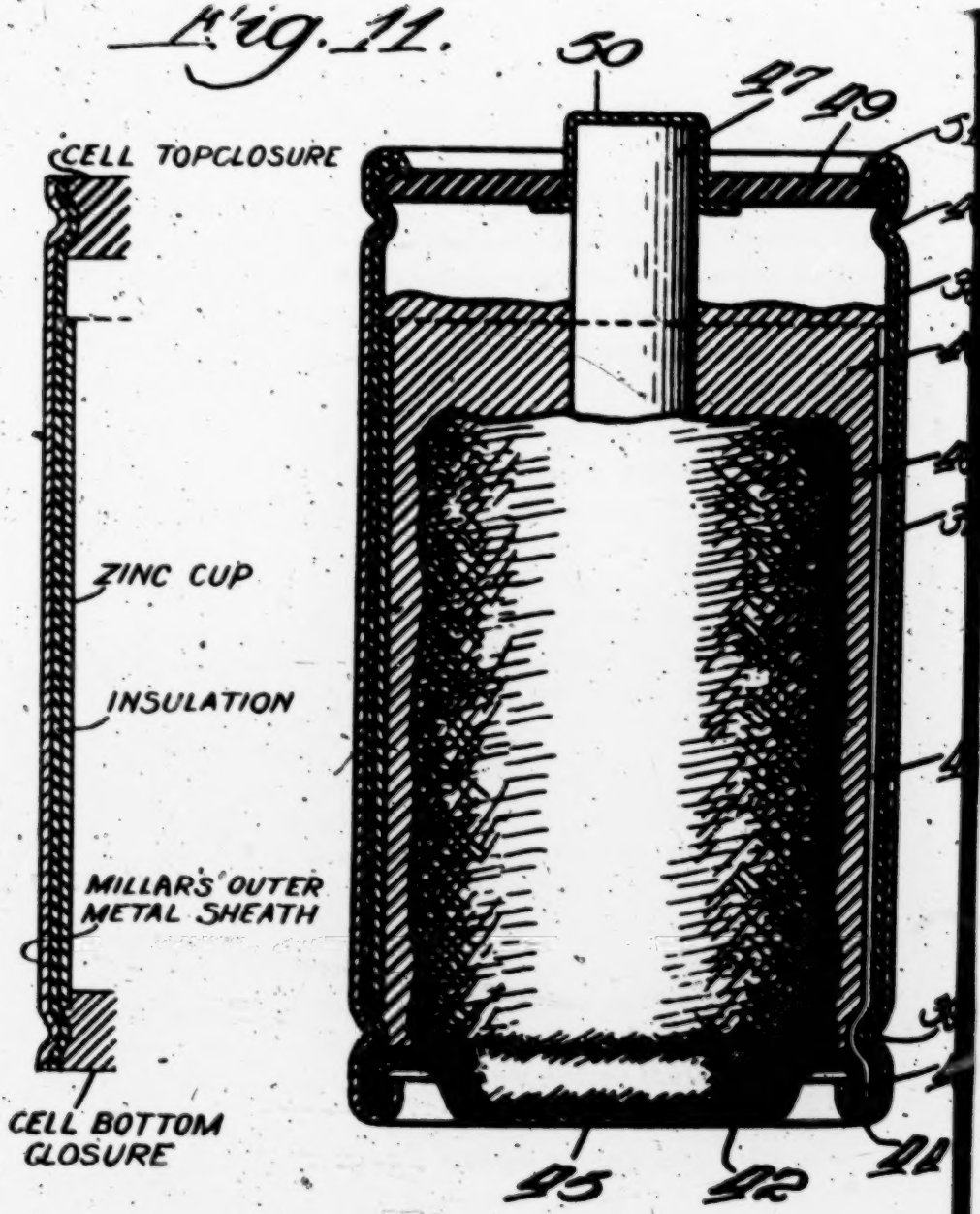
closed in the Anthony patent. We have pointed out in our main Brief that it makes no difference that Olaneta was a file reference. The Examiner failed to appreciate its use as a flashlight cell. The decisions of the Patent Office Examiner are not binding on the Supreme Court.

In answer to Petitioner's contention that the Anthony patent fails to adequately disclose the invention, Respondent states that neither the Olaneta patent nor the Deibel patent discloses how thick the walls of the outer casing should be. This is not a logical argument, for neither Olaneta nor Deibel is claiming broadly a sheet metal jacket on any kind of a dry cell. Even if Respondent's contention were sound, the failure of Olaneta or Deibel to comply with the statute does not excuse Anthony for failing to comply with the statute.

Respondent says that Olaneta is not a flashlight dry cell. We have pointed out in our main Brief that the prior art, such as Corigliano patent in Appendix III, page 51, clearly shows the adaptability of door-bell cells to flashlight use by merely cutting away a part of the bottom of the door bell cell and using it as a contact or terminal. The same double use is also shown in Smith (Rec. p. 226) and British patent (Rec. p. 239). So far as the Record shows, these patents were not before the Examiner.

Respondent criticizes the Millar patent (Brief page 31) by saying that it is a storage battery and not a dry cell. Both dry cells and wet cells are used in flashlights, as will appear from the Millar patent. Respondent also states (Brief page 32) that Millar discloses an opening 10 in the side wall of the casing. This also is immaterial, as Anthony also shows a vent for relieving excessive pressure in Figs. 1 and 11. What Millar does show is the alleged novel element of claim 1, namely:

"a protecting sheet metal sheath insulated from both of said electrodes and enclosing the side walls of said



This drawing shows Millar's outer metal sheath 9 applied to a dry cell, the metal sheath "tightly embracing" both end closures as called for by claim 1 of the Anthony patent in suit and as compared with Fig. 11 of the Anthony patent.

metal electrode and tightly embracing said closure so as to prevent leakage of the electrolyte from the unit,"

such element being used in a flashlight cell and for the purpose of preventing leakage and swelling.

Respondent says that Millar does not have "flanges which overlap the end closures." We call attention to the fact that the Anthony claim 1 is not so limited. The claim merely recites a sheet metal sheath "tightly embracing the end closures." Millar clearly discloses such a sheath which is alleged to be the novel element of the claim.*

On page 33 Respondent criticizes the British patent and says that it does not disclose a metal jacket nor is the jacket designed to withstand pressure. The top "b" in Fig. 1 of the British patent may be sheet metal (Rec. p. 239). There is no invention in making the sheath "a" of Fig. 3 of metal instead of a moulded plastic, even if sheet metal were not suggested for the top. If Anthony's disclosure is sufficiently definite to comply with the Statute (4888 R. S., 35 U. S. C., Sec. 33), then the British patent is sufficiently definite to be an anticipation of the Anthony claims. Accordingly, the outer jacket of the British patent is designed to withstand pressure and is illustrated as being of sufficient thickness to accomplish that purpose.

THE RULINGS IN THE SUPREME COURT CASES CITED AT PAGE 41 OF RESPONDENT'S BRIEF DO NOT PRECLUDE A COMPLETE REVIEW BY THIS COURT OF THE LOWER COURTS' CONCLUSIONS.

At pages 14, 15, 40 and 41 Respondent cites law and argues that this Court should not disturb the findings of fact of the lower Courts but makes no distinctions between facts established by the evidence and the inferences and conclusions which Respondent included in the "Findings

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* A drawing showing the Millar sheath applied to a dry cell such as disclosed in Fig. 11 of the Anthony patent appears on the opposite page.

of Fact" (Rec. p. 136) prepared by Respondent and adapted *in toto* by the Trial Court (Rec. p. 115).

There is no serious conflict or dispute here with regard to the evidentiary facts. Plaintiff (Respondent) offered no rebuttal testimony. **The conflict is in the inferences and conclusions drawn from the evidence** and incorporated into the "Findings of Fact" by Respondent **and which are not supported by the evidence.**

In none of the cases cited at page 41 of Respondent's Brief did this Court fail to review the evidence as is clearly indicated by the opinions set forth therein. In *Williams Mfg. Co. vs. United Shoe Machinery Corp.* (316 U. S. 364, 367) Williams waived all exceptance to the facts. Such is not the case here.

Under the old Equity Practice, before the adoption of the new Federal Rules, if it clearly appeared that the evidence did not support the findings, or that the lower Court misapprehended the evidence, the findings of fact might be set aside. (*Katz Underwear Co. v. U. S.*, 127 F. 2d, 965 (Certiorari denied, 63 S. Ct. 51.)) The new Rules did not change this law.

Circuit Courts of Appeals are no longer merely courts of error which consider only law questions in jury-waived cases, but act as courts of review in all non-jury cases in accordance with the practice which formerly prevailed in equity appeals. (*Aetna Life Insurance v. Kepler*, 116 F. (2d) 1.)

Speaking of Rule 52 F. R. C. P., in the case of *Kuhn v. Princess Lida of Thurn & Taxis*, 119 Fed. (2d) 704, Circuit Judge Jones of the Third Circuit Court of Appeals, said:

> "The rule does not operate, however, to entrench with like finality the inferences or conclusions drawn by the trial court from its findings. And so, while accepting the facts competently found by the trial court as correct, an appellate court remains free to draw the ultimate inferences and conclusions which, in its opinion, the findings reasonably induce. Such was the law

prior to the promulgation of the Rules of Civil Procedure. *Brown v. United States*, 3 Cir., 95 F. (2d) 487, 490; *Dunn v. Trefry*, 1 Cir., 260 F. 147, 148. The new Rules have worked no change in this regard, or with respect to the ultimate conclusions in jury-waived cases in particular.

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The sufficiency of the evidence to sustain a trial court's conclusion or finding of an ultimate fact remains appropriate matter for an appellate court's consideration. *State Farm Mutual Automobile Insurance Co. v. Bonacci et al.*, 8 Cir., 111 F. 2d, 412, 415. Where the evidentiary facts are not in conflict or dispute, the conclusions to be drawn therefrom are for the appellate court upon review of the trial court's action. * * * An incorrect conclusion by a trial court qualifies as a 'clearly erroneous' finding, for the correction whereof on appeal Rule 52(a) specifically provides."

We submit that an appellant in a non-jury case is entitled (under Federal Rule 52(b)) to a full review of the findings of the Trial Court, and to the independent judgment of the Appellate Court on the sufficiency of the evidence to support the findings, and the inferences and conclusions drawn therefrom. Moreover, we contend that the issues of validity, and infringement, and the scope of the claims are **at least** mixed questions of law and fact to which this Court should give full consideration.*

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* In the instant case five of Plaintiff's nine witnesses were not before the Trial Court as their testimony was given by deposition. In such a case slight weight is given to the findings of the Trial Court. (*Equitable Life Assur. Soc. of the United States v. Irelan*, 123 F. 2d, 462). The Supreme Court reversed in whole or in part concurring decrees of the District Court and the Court of Appeals in the following recent patent cases:

Exhibit Supply Co. v. Ace Patents Corp., 315 U. S. 125;
Altoona Publix Theatres, Inc. v. American Tri-Ergon Corp., 294 U. S. 477;
U. S. Industrial Chemicals v. Carbide and Carbon Chemicals Corp'n, 315 U. S. 668-681, 86 L. Ed. 1105;
Sola Electric Co. v. Jefferson Electric Co., 87 L. Ed. Adv. Ops., 151.

CONCLUSION.

It is Petitioners' final position that the structural differences between the dry cell disclosed and claimed in the Anthony patent, and the dry cells disclosed in the prior art relied upon, are **not** sufficient to amount to invention; that the Anthony patent, as now asserted, is invalid for lack of adequate disclosure; that the claims in suit have **not** been infringed by Petitioners; and that the judgment of the Seventh Circuit Court of Appeals should be reversed, and the Complaint dismissed with costs to Petitioners.

Respectfully submitted,

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